MEDICAL JURISPRUDENCE

Limited Liability for Directions To Use a Medicine in an "Acceptable" Way

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IN THE CASE of *Gielski v. the State of New York** action was brought against the state for personal injuries sustained by a 25-year-old farmer because of total paralysis below the tenth vertebra, as a result of intraspinal injection by the plaintiff's own physician of tetanus anti-toxin serum, made and distributed to physicians, free of charge, with accompanying instructions, by the State Department of Public Health.

The instructions of the State Department of Public Health distributed with each package of the serum stated that there were three methods for administering the tetanus anti-toxin serum, and that there was a considerable difference of opinion as to which is the more effective route, but that on the basis of reports received, combined intravenous and intraspinal administration appeared to have an advantage.

The plaintiff claimed the state was negligent in making the latter statement. Substantial medical opinion was introduced that the great weight of medical opinion condemned the intraspinal administration of tetanus anti-toxin for therapeutic purposes. The trial court found for the plaintiff, on the basis that the state must be required to keep up with modern medical theories and procedures.

The appellate court reversed the decision and held that medicine is not an exact science, and that there is a difference of respectable, medical opinion as to the most effective method to administer tetanus anti-toxin serum. The court further stated:

"The record demonstrates that medical opinion and medical textbooks differ on the subject. By honestly accepting one field of responsible medical opinion, though others, and perhaps more numerous, medical opinions may differ, does not constitute negligence simply because in a particular case the result was disastrous. To hold the state liable under the circumstances presented here would mean that either the state must render no public service at all, or be an insurer against any bad results that might follow . . ."

The court further pointed out that there is no authority that a physician, whether employed by the state, or in a private practice, must use what some physicians consider the best method if a method which is accepted by respectable medical authority is adopted.

*200 NYS (2d) 691.

Implied Warranty of a New Medicinal Agent

POLIOMYELITIS was contracted by two children, Anne Gottsdanker and James Phipps, shortly after they had been inoculated with Salk vaccine manufactured by Cutter Laboratories. The vaccine administered to each child was purchased by their physician from a pharmacy in a sealed container.

An action for damages was brought in behalf of each child against Cutter Laboratories, the plaintiffs contending that Cutter's vaccine caused the illness it was designed to prevent. The physicians who injected the vaccine were not sued.

Jury verdicts were returned in favor of the two children for a total of almost $150,000. (Gottsdanker, et al. v. Cutter Laboratories, 182 A.C.A. 696.)

There was substantial evidence that the vaccine contained live virus of poliomyelitis and that it actually and directly caused the plaintiffs to contract poliomyelitis.

The case presented to the jury was based on three theories of "causes of action." One was an allegation of negligence in manufacture, the second was breach of an implied warranty of merchantability and the last was breach of implied warranty of fitness for the intended purposes.

When the jury returned its verdict, it reported first that Cutter Laboratories was not negligent. But it found for the plaintiffs on the grounds there was a breach of warranty since the vaccine caused them to have poliomyelitis.

The case was appealed primarily to present the question whether the law relating to implied warranties of merchantability and of fitness apply under the facts of this case.

The appellate court, noting that in California both the seller and the manufacturer imply warranty of